



September 25, 2018

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Reference: AICPA Early Engagement Input to Section 1006 of the FY2019 NDAA

The American Institute of Certified Public Accountants (“AICPA”) appreciates the opportunity to provide early input on the rulemaking process of the Defense Acquisition Regulations Council (“Council”) to implement the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“NDAA”). The AICPA’s input focuses on Section 1006 of the NDAA. Section 1006 requires, for the first time, that accounting firms providing certain audit and audit remediation services to the Department of Defense must submit a statement describing disciplinary proceedings instituted by certain governmental or regulatory entities including, as discussed below, some proceedings that Congress has mandated remain non-public.

Our concerns regarding the implementation of Section 1006 fall into three principal categories. First, Section 1006 requires reporting of certain proceedings by accounting firms, but not other firms that may also provide audit remediation services to the Department. This imbalance not only creates a competitive disadvantage for accounting firms but also risks complications in the Department’s well-established bidding processes that could hinder efficient functioning of the Department’s objectives. Second, Section 1006 is silent on the confidential treatment that will be accorded to statements submitted pursuant to that provision. Certain proceedings that are initiated against accounting firms and accountants by federal and state agencies are required to be kept confidential as a matter of law. It is therefore critical that the rulemaking to implement Section 1006 accord strong confidentiality protections to the statements submitted under that provision. Third, there are several significant ambiguities in Section 1006 that can be clarified in the rulemaking process. We provide our input on these areas below.

Unintended Consequences Arising from Imbalanced Reporting Requirement: Section 1006 requires that an “accounting firm” providing audit and audit remediation services to the Department must report proceedings by “any entity with the authority to enforce compliance with rules or laws applying to audit services offered by accounting firms.” Many accounting firms providing audit and audit remediation services are under the jurisdiction of numerous such entities, including the Public Company Accounting Oversight Board (“PCAOB”) and various state boards of accountancy, while other firms providing such services may not be registered with the PCAOB or indeed, may not even be “accounting firms.” And, as described below, proceedings initiated by the PCAOB and certain state accountancy boards against accounting firms are non-public. The fact that some accounting firms bidding on audit remediation services would have to report confidential proceedings that have not been fully adjudicated, whereas other firms, including non-accounting firms, bidding on a contract for the same services would not, puts the PCAOB-registered firms at a competitive disadvantage and is fundamentally unfair. Non-accounting firms providing audit remediation services to the Department may in fact be subject to ongoing proceedings that are relevant to the Department but would not be obligated to

report such proceedings. We are concerned that this imbalance in reporting that has arisen as a result of Section 1006 presents risks for the Department's contracting processes. In particular, the Federal Acquisition Regulation ("FAR") requires full and open competition and emphasizes the need for consistency in the evaluation factors used for contract awards. FAR §§ 6.101(a) and 15.303(b)(3)-(4). These principles are threatened by the imbalanced reporting requirements if one firm seeking to provide audit remediation services has reported proceedings information, but another firm has not. The reporting disparities could hinder the Department's ability to perform its contracting function effectively. A process that does not involve an apples-to-apples comparison also could open Department actions to bid protests, further impeding the Department's mission. *See Symplicity Corp.*, B- 291902, Apr. 29, 2003, 2003 CPD ¶ 89 (sustaining bid protest based on "apples and oranges" comparison). We encourage the Council to consider and address these issues in its rulemaking process, including by evaluating how any use of statements submitted pursuant to Section 1006 in connection with the Department's evaluation of a contractor's past performance will be made in a manner that promotes full and open competition and achieves consistency in the evaluation factors used for contract awards.

Confidentiality of Statements Submitted: The AICPA believes the implementation of Section 1006 should not undermine the confidentiality protections that Congress and certain states have afforded to proceedings against accountants in other contexts. Notably, the Sarbanes-Oxley Act of 2002 requires that disciplinary proceedings instituted by the PCAOB against registered public accounting firms and their personnel "shall not be public." The PCAOB is prohibited from disclosing even the existence of a disciplinary proceeding unless and until that proceeding concludes in a manner such that sanctions are imposed on the respondent. Similarly, certain state laws require proceedings against accounting firms and accountants to be confidential. We believe it is critical that the Department act in a manner consistent with these federal and state laws by adopting strong confidentiality protections when implementing Section 1006. The AICPA believes the following provision would be appropriate to accomplish this objective:

The Government shall safeguard and treat as confidential all statements provided pursuant to Section 1006 where the statement has been marked "confidential" or "proprietary" by the Contractor. Statements so marked shall not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor and opportunity for the Contractor to claim an exemption from release. The Government under all circumstances shall treat any statement provided pursuant to this section as confidential to the extent required by any other applicable law.

Clarifications to Address Statutory Ambiguities in Section 1006: We believe there are several ambiguities in Section 1006 that, if not addressed through the rulemaking process, could have significant unintended consequences. Specifically:

- First, we encourage the Council to clarify in the rulemaking the type of audit and audit remediation services that are relevant for purposes of the Section 1006

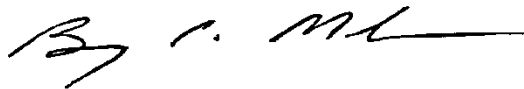
reporting requirement. Section 1006 applies to “any accounting firm providing financial statement auditing or audit remediation services to the Department of Defense in support of the audit required under section 3521 of title 31, United States Code.” This language leaves open which specific “audits” and “audit remediation services” are covered by Section 1006, and how closely those services must be tied to the processes laid out in 31 U.S.C. 3521 to qualify as “in support of” those processes. As a result, there is potentially a broad range of audit-related and audit remediation-related activity that could inadvertently be swept into the reporting requirement. To avoid this ambiguity, we encourage the Council to specify in the rulemaking that the “audits” for which statements are required are those described in 31 U.S.C. 3521(e), which are audits of the financial statements required to be prepared pursuant to 31 U.S.C. Section 3515 (i.e., financial statement audits of the Department and the Department’s sub-agencies). Similarly, the rulemaking should clarify that the “audit remediation services” for which statements are required are services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b, which Congress referred to in Section 1002 of the NDAA and presumably reflects its intent in including the “audit remediation” phrase in Section 1006.

- Second, the statement described in Section 1006 is required as to certain proceedings against both the accounting firm and its “associated persons.” However, the statute does not define who qualifies as an “associated person” of an accounting firm. The rulemaking should clarify that associated persons are partners, principals and employees of the accounting firm that is providing the statement required under Section 1006.
- Third, Section 1006 requires a firm to submit a statement if it is “providing financial statement auditing or audit remediation services” to the Department. We encourage that the rulemaking clarify when a firm is considered to be “providing” such services to the Department. Specifically, the rulemaking should clarify that accounting firms “providing” the subject services are those that are parties to contracts with the Department for the provision of such services.
- Fourth, although Section 1006 does not make clear what disciplinary proceedings are required to be reported, the Conference Report for Section 1006 refers to “relevant disciplinary proceedings.” H. Rep. No. 115-874, at 938-39 (2018). To focus the reporting on proceedings that are relevant for the Department’s oversight of contractors providing audit-related services, we encourage the Council to consider specifying the proceedings covered by Section 1006, such that they are limited to proceedings involving audits for governmental entities or proceedings related to audits of Department contractors[, or other types of proceedings that the Department may determine to be relevant based on its own analysis].

- Fifth, we encourage the Council to clarify in the rulemaking the types of “disciplinary proceedings” that must be reported on a Section 1006 statement. In connection with this clarification, we note that the Conference Report states explicitly that the reporting requirement applies to “disciplinary proceedings currently in progress.” H. Rep. No. 115-874, at 938-39 (2018). To be consistent with that legislative intent, the Council should clarify in the rulemaking that the disciplinary proceedings to be reported are those that have been formally initiated by a relevant entity.
- Sixth, Section 1006 provides that the statement “set[] forth the details” of any relevant disciplinary proceeding. We encourage the Council to specify in the implementing regulations the “details” that are to be included in statements submitted to the Department pursuant to Section 1006. In this regard, we believe the regulations should specify that the statements contain identifying information about the proceeding at issue, such as the tribunal hearing the case and the case or file number, as well as a brief description of the allegations or conduct at issue.
- Seventh, we encourage that the rulemaking clarify when and how often statements are to be submitted to the Department. To reduce the administrative burden to the Department and to contractors, the implementing regulations should clarify that statements need not be submitted more often than annually.

Thank you for the opportunity to submit early engagement input. Please contact Mark Peterson at Mark.Peterson@aicap-cima.com or 202-434-9200 with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "B. C. Melancon".

Barry C. Melancon, CPA, CGMA
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